

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE DISTRICT OF MONTANA  
3                   BUTTE DIVISION

4  
5                   JOHN MEYER,  
6                   Plaintiff,  
7                   vs.                   Cause No. 18-CV-00002-BMM  
8                   BIG SKY RESORT, INC.  
9                   Defendant.

10  
11                  VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF  
12                  TOM McMAKIN

13  
14                  BE IT REMEMBERED, that the videotaped  
15 deposition upon oral examination of TOM McMAKIN,  
16 appearing at the instance of Defendant, was taken  
17 at the offices of Crowley Fleck, PLLP, 1915 South  
18 19th Avenue, Bozeman, Montana 59718 on the 21st day  
19 of January 2020, beginning at the hour of 1:34 p.m.  
20 pursuant to the Federal Rules of Civil Procedure,  
21 before Marla Jeske, Court Reporter - Notary Public,  
22 CSR.

1 APPEARANCES  
2

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1	I N D E X	
2	EXAMINATION OF TOM McMAKIN BY	PAGE
3	Mr. Ian McIntosh, Esq.....	5, 35
4	Ms. Breean Walas, Esq.....	19, 38
5	E X H I B I T S    R E F E R R E D    T O:	
6	Exhibit 19.....	35, 38
7	Exhibit 24.....	8, 13-14, 19, 27
8	Exhibit 25.....	9-10, 13-14, 19-20, 27
9	Exhibit 29.....	11, 13, 19
10	DEPOSITION EXHIBITS:	
11	Exhibit 65      Colored Photograph.....	20-21
12	Exhibit 66      Big Sky Ski Patrol Witness Statement dated 12/11/15.....	22-23
13	Exhibit 67      Evi Dixon letter dated Sunday, December 13, 2015.....	25-26
14	Exhibit 68      Colored Photograph.....	36-37
15	Exhibit 69      Colored Photograph.....	36-37
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 WHEREUPON, the following proceedings were had  
2 and testimony taken, to-wit:

3  
4 \* \* \* \* \*

5  
6 VIDEO TECHNICIAN: This is the time and  
7 place set for the video deposition of Tom McMakin  
8 in the case of John Meyer, plaintiff, versus Big  
9 Sky Resort, defendant. It is Cause Number  
10 18-CV-00002-BMM in the United States District Court  
11 for the District of Montana, Butte Division.

12 This video deposition is being held at  
13 the offices of Crowley Fleck, located at 1915 19th  
14 Avenue in Bozeman, Montana.

15 Today's date is January 21st, 2020. The  
16 time is 1:34 p.m.

17 The court reporter is Marla Jeske with  
18 Bridger Court Reporting. I'm Mark Brown, the  
19 videographer.

20 Will the attorneys please now identify  
21 themselves for the record.

22 MS. WALAS: Breean Walas on behalf of the  
23 plaintiff.

24 MR. MCINTOSH: Ian McIntosh for the  
25 defendant, with Mac Morris.

1           VIDEO TECHNICIAN: Will the witness now  
2 please be sworn in.  
3

4                         \* \* \* \* \*

5  
6                         TOM McMAKIN,  
7 called as a witness herein, having been first duly  
8 sworn, was examined and testified as follows:  
9

10                         EXAMINATION

11           BY MR. MCINTOSH:

12           Q. Can you please state your name?

13           A. Full name is Thomas Wilson McMakin, Tom  
14 McMakin.

15           Q. Mr. McMakin, where do you live?

16           A. 305 Evening Star Lane, Bozeman, Montana.

17           Q. And, Mr. McMakin, what do you do for  
18 work?

19           A. I'm a CEO of a consulting firm called,  
20 Profitable Ideas Exchange.

21           Q. What does Profitable Ideas Exchange do?

22           A. So we help large professional services  
23 firms, like accounting firms and firms like Bain or  
24 BCG or McKinsey, drive their business development  
25 efforts.

1 Q. Thank you.

2 And I understand that you were skiing at  
3 the Big Sky Ski Resort on December 11, 2015; is  
4 that correct?

5 A. Correct.

6 Q. And did you witness a ski wreck  
7 involving a person that you later learned was  
8 John Meyer?

9 A. I did.

10 Q. Okay. I want to talk to you in detail  
11 about that ski wreck. But before we get into the  
12 details about the wreck, I want to back up and just  
13 talk about what you were doing there and why you  
14 were there that day --

15 A. Sure.

16 Q. -- okay?

17 So let's start with that. Before we get  
18 into any of the details, tell me what were you  
19 doing at Big Sky on December 11, 2015?

20 A. So we had -- I think at the time we had  
21 about 30 people in the company, PIE, Profitable  
22 Ideas Exchange, and we had taken them and their  
23 spouses or partners on a ski day.

24 Q. So you were skiing just with your  
25 employees?

1 A. Correct.

2 Q. And can you describe your ski abilities  
3 at that time?

4 A. Yeah, so I've been skiing -- I'm 58.  
5 I've probably been skiing since I was five years  
6 old. But I'm not a double black diamond expert  
7 skier. I look good on tough blue square groomers  
8 and I can get down anything, so somewhere in that  
9 netherworld between high intermediate and low  
10 expert.

11 Q. Got it. And how about the people you  
12 were skiing with, how did your abilities compare to  
13 them?

14 A. You know, we broke up, because we  
15 probably had 40 people there with partners, into  
16 smaller groups and I was with a fast group. So, I  
17 mean we were all comparable.

18 Q. Okay. And sometime after 10:00 a.m. in  
19 the morning, were you skiing the Challenger  
20 chairlift area?

21 A. Yes.

22 Q. And do you remember what you skied?  
23 Shortly before you witnessed John Meyer's ski  
24 wreck, do you remember what ski run you skied?

25 A. I don't. I don't have very good

1 knowledge. My recollection is that we skied out of  
2 Moon Light Basin, the tented area there and we were  
3 kind of skiing over to the Big Sky. So the run in  
4 question was kind of a -- kind of a northeastern  
5 facing run, that's my recollection, moving toward  
6 the Big Sky Resort, yeah.

7 Q. Okay. So you were moving towards the  
8 Big Sky base area?

9 A. Yeah, exactly.

10 Q. Okay. I'm going to hand you what has  
11 previously been marked in this case as Exhibit  
12 Number 24.

13 A. Uh-huh.

14 Q. Do you recognize what is shown in  
15 Exhibit 24?

16 A. Sure. So as I look at this, behind me  
17 is a steep slope and this is a traversing road that  
18 roughly goes from the south to the north and in  
19 front of that is a kind of ungroomed area and the  
20 wide slope in the sort of more distant perspective  
21 goes down to the base area. And I know there's a  
22 big -- I mean I knew afterwards because we went  
23 down, there's a big ski patrol hut there.

24 Q. And is the ski run that is shown in  
25 Exhibit 24, is that the run you skied shortly

1 before you witnessed Mr. Meyer's ski wreck?

2 A. Correct. So as I'm looking at this,  
3 directly behind me is the sort of steep slope and I  
4 had come down that slope and rested on that  
5 traversing road. When I say "rested," I stopped  
6 and I was waiting for the rest of our sort of  
7 subset group to catch up with me.

8 Q. Okay. Let me show you another picture  
9 taken just a little bit further downhill. This is  
10 a photograph that's been previously marked in this  
11 case as Exhibit Number 25.

12 A. Uh-huh.

13 Q. And do you recognize what is shown in  
14 Exhibit 25?

15 A. Yeah. So that's the traversing road.

16 Q. The cat track that you see going from --

17 A. Correct.

18 Q. -- right to left of the --

19 A. Yep.

20 Q. -- photograph?

21 And do you agree that Exhibit 25 shows  
22 the area that you skied shortly before you saw  
23 Mr. Meyer's ski wreck?

24 A. Correct.

25 Q. And do I understand you to say from your

1 earlier testimony that you skied down this -- down  
2 this ski run and stopped on the cat track shown in  
3 Exhibit 25?

4 A. Correct.

5 Q. Would you agree with me that you can see  
6 the cat track in Exhibit 25?

7 A. Correct, yes.

8 Q. Would you agree with me that it's  
9 obvious?

10 A. Oh, yeah. Yes.

11 Q. And above that we see some trees and I  
12 guess sort of stumps and things like that sticking  
13 through the snow; is that right?

14 A. I don't see stumps. I see sort of low  
15 trees, brush.

16 Q. That's probably a better description,  
17 thank you. Thank you, Mr. Makin [sic] -- Mr.  
18 McMakin.

19 And is that the type of thing that you  
20 expect to see when you're skiing in early season  
21 conditions?

22 A. Yes.

23 Q. And were you able to safely ski down the  
24 run shown in Exhibit 25 onto the cat track?

25 A. Yes.

1 Q. You were able to safely make the  
2 transition from the cat track onto the run?

3 A. Hum.

4 Q. In other words, you didn't wreck when  
5 you skied onto the cat track, did you?

6 A. Yeah, I just think you had it in  
7 reverse. I was able to successfully go down the  
8 ski run to the cat track.

9 Q. And were you skiing in control?

10 A. Absolutely.

11 Q. And you then stopped on the cat track?

12 A. Correct.

13 Q. Okay. I want to show you one more  
14 photograph. This is a photograph that was  
15 previously marked in this case as Exhibit Number  
16 29.

17 Now looking at all of those photographs  
18 that you have in front of you, did you stop on the  
19 cat track in approximately the area where the  
20 person is shown in Exhibit 29?

21 A. Yes.

22 Q. And when you stopped there, did you then  
23 look back uphill to see the other skiers that you  
24 were with?

25 A. Yes, I was waiting for the rest of the

1 party to catch up.

2 Q. Okay. So you were skiing faster than  
3 them or you got down to that area faster than they  
4 did?

5 A. Yeah. I might have started first.

6 Q. Okay.

7 A. They might have been gaining on me, I  
8 don't know.

9 Q. And when you look back uphill, did you  
10 see a person coming down that you eventually  
11 learned was John Meyer?

12 A. Yes.

13 Q. And can you describe for me what you saw  
14 when you saw Mr. Meyer skiing down the hill?

15 A. You know what I told my wife, I said he  
16 was -- there was a guy, he came around kind of the  
17 high corner and he was bombing down the slope at  
18 sort of like -- at a high speed.

19 Q. Okay. What do you mean "bombing down  
20 the slope"?

21 A. You know, when you ski -- you know, this  
22 is sort of -- it's rough and it's hard to tell with  
23 these pictures but it's -- you know, I have a  
24 strong recollection that it was lightly moguled and  
25 when you ski something like that, people like me

1 tend to carve their way down through the moguls  
2 and -- but when someone's bombing down, they're  
3 taking the moguls all in their thighs, bumping  
4 straight down with no curves at all. So that's  
5 what I mean by "bombing."

6 Q. Okay. And was Mr. Meyer skiing down the  
7 run shown in Exhibits 24 and 25?

8 A. Correct.

9 Q. And did he ski down toward you when you  
10 were standing on the cat track in the location of  
11 the person shown in Exhibit 29?

12 A. Correct. He basically was following the  
13 same path that I took to get to the cat track.

14 Q. Okay. And was he skiing faster than you  
15 would expect someone who described themselves as an  
16 intermediate skier to ski?

17 MS. WALAS: Objection, foundation.

18 MR. MCINTOSH: Go ahead.

19 THE WITNESS: I can go ahead?

20 MR. MCINTOSH: Yes.

21 THE WITNESS: Absolutely faster than an  
22 intermediate skier, sort of a -- I would have  
23 characterized his skiing as the kind of skiing that  
24 only someone that was a high expert would ski.

25 ///

1 BY MR. MCINTOSH:

2 Q. And did Mr. Meyer --

3 A. Very fast.

4 Q. Excuse me, very fast?

5 A. Yes.

6 Q. So you would agree that Mr. Meyer was  
7 skiing very fast?

8 A. Very fast.

9 Q. Faster than you skied the run?

10 A. A lot faster than I skied the run, a lot  
11 faster than anyone else skied the run that I saw.

12 Q. And did Mr. Meyer slow down before he  
13 reached the cat track that you were standing on?

14 A. No.

15 Q. And did Mr. Meyer -- well, did he safely  
16 ski onto the cat track?

17 A. He did.

18 Q. Can you just describe for me what you  
19 saw as Mr. Meyer transitioned from this run shown  
20 in Exhibit 24 and 25 onto the cat track?

21 A. So my impression in the split second  
22 that this all transpired was that he was a high  
23 expert skier. He was sort of hotdogging down the  
24 slope at a high rate of speed capitalizing on his  
25 high ability to do that and that he was going to

1 use the cat track as a jump.

2 Q. And why do you say he was -- why do you  
3 say you thought he was going to use the cat track  
4 as a jump?

5 A. Because he didn't slow down at all and  
6 it was -- it was obvious that the cat track was in  
7 front of him, but more obvious was that there was a  
8 drop-off on the other side.

9 Q. The downhill side of the cat track?

10 A. Yeah, exactly, exactly. Into an  
11 unplowed area -- or not unplowed, ungroomed area or  
12 unskied area.

13 Q. Okay. Was there anything that would  
14 have prevented Mr. Meyer from slowing down or  
15 stopping on the cat track where you stopped?

16 A. If he had been going at a lower rate of  
17 speed, nothing would have prevented him. But at  
18 that speed, I'm not sure he could have stopped at  
19 the last minute if he wanted to.

20 Q. Okay. So what happened after Mr. Meyer  
21 safely transitioned onto the cat track?

22 A. He was launched into the air and flipped  
23 around.

24 Q. And did it look to you like he was  
25 trying to jump off the downhill edge of the cat

1 track?

2 A. It did.

3 Q. And then what happened?

4 A. So he landed on his back in deep snow.  
5 And the reason I feel like I thought he was trying  
6 to jump is because I thought that he failed to do  
7 what he wanted to do, which was to jump  
8 successfully and flip. And I remember saying -- it  
9 was a little uncharacteristic for me but I was like  
10 "Whoa, dude, that was awesome. Are you all right?"  
11 Because I thought he was trying to execute a really  
12 hard thing to do, which was flip off the cat track.

13 Q. And did you go to Mr. Meyer's aid and  
14 help him?

15 A. So I looked at him and I said that  
16 and then -- and he didn't answer. And so then I  
17 kind of got off the cat track and started to  
18 traverse the unskied area, the deeper snow and I  
19 probably -- I didn't go very far, five feet or so,  
20 and then I could see that he was on his back and  
21 his arms were wide open and he was shaking and it  
22 looked like something was coming out of his mouth.  
23 And I was like, oh, my God, he's in deep trouble,  
24 deep, deep trouble, and that's when I saw the log.  
25 He basically flipped and landed on a log. And I

1 immediately thought well, he's broken his neck.

2 Shall I just continue?

3 And so I remember -- I mean I remember  
4 this very clearly, there were some younger people.  
5 I can't call them kids, right? I'm like anybody  
6 younger -- I'm 58, so younger than I am, people,  
7 sort of a mass on the cat track, maybe 12 people or  
8 so. And this shows my age. I said, "Someone ski  
9 down and get ski patrol."

10 And then some kid said "Or, dude, we  
11 could just call them on the cell phone."

12 And I was like, "Right. You're right.  
13 That is what you could do. That would be better."

14 Q. So someone called ski patrol?

15 A. I assume. Ski patrol was there very  
16 quickly.

17 Q. Very quickly?

18 A. Very quickly.

19 Q. And when Mr. Meyer tried to -- or based  
20 on what you thought he was trying to do, tried to  
21 jump off that downhill edge of the cat track, how  
22 far away were you?

23 A. That's a good question. Probably 10  
24 feet.

25 Q. And based on what you saw and what you

1 observed from 10 feet away, what did you conclude  
2 was the cause of Mr. Meyer's ski wreck?

3 A. His failure to execute the jump off  
4 of this track or -- you know, I felt like  
5 there's -- there was a change. So you had this  
6 sort of skied area, so that's one kind of  
7 topography, and then you have the track, so you hit  
8 the track, but it's quite -- it's quite packed  
9 down. It has a kind of accelerating kind of  
10 function that it plays and then on the other side  
11 of it it got rough again. And I thought he hit  
12 that roughness on the far side of the track and  
13 that that flipped him over. But it's conjecture on  
14 my part. But that's what it felt like.

15 Anyway, if you ski, you know that a  
16 change in the quality of the snow from fast and  
17 slick to rough and unskied and icy and choppy can  
18 trip you up.

19 Q. And did you believe Mr. Meyer's speed he  
20 was skiing at contributed to his ski wreck?

21 A. Absolutely.

22 Q. Mr. McMakin, I believe that's all the  
23 questions I have. If we could just go off the  
24 record for a few minutes while I check my notes.

25 A. You bet.

1 Q. Thank you.

2 A. Yeah.

3 VIDEO TECHNICIAN: We're now off the record.

4 The time is 1:50.

5 (Whereupon, a brief  
6 recess was taken.)

7 VIDEO TECHNICIAN: We're now back on the  
8 record. The time is 1:51.

9 MR. MCINTOSH: Mr. McMakin, thank you for  
10 your time. Thank you for coming in today. I have  
11 no further questions at this time.

12 THE WITNESS: Thanks.

13 EXAMINATION

14 BY MS. WALAS:

15 Q. All right. Mr. McMakin, I want to  
16 follow up on a couple of things that you were asked  
17 about and then also some other further questions I  
18 might have.

19 You were asked about Exhibit 24.

20 A. Which one is that?

21 Q. Which would be the one that has this  
22 little guy over here in the corner.

23 A. Oh, this guy. I got it.

24 Q. Yep. And 25, which would be the one  
25 that you have three guys?

1 A. Yep.

2 Q. Okay. Where were you standing on the  
3 cat track in relation to Mr. Meyer's wreck?

4 A. You know, to be honest, I don't recall  
5 but roughly where those three people are.

6 Q. Okay. And that's on Exhibit 25?

7 A. Yeah.

8 Q. Okay. And where did Mr. Meyer wreck?

9 A. In the snow field above in the picture  
10 of the three people.

11 Q. Above the picture of the three people?

12 A. Yeah.

13 Q. So if you were -- I'm going to go ahead  
14 and give you this blue pen.

15 A. Uh-huh.

16 Q. And if you'll go ahead and mark that,  
17 I'm going to make this Depo Exhibit 1.

18 MR. MCINTOSH: No.

19 MS. WALAS: Do you guys roll over?

20 MR. MCINTOSH: Yep.

21 MS. WALAS: Okay. What number are we on?

22 MR. MCINTOSH: 65.

23 MS. WALAS: 65, okay. So this will be  
24 Exhibit 65.

25 ///

(Whereupon, Deposition  
Exhibit Number 65 was  
marked for identification.)

THE WITNESS: So roughly there.

BY MS. WALAS:

Q. Roughly there?

A. Yeah.

Q. Okay. And if you don't mind, will you circle that just to make it clear?

A. Uh-huh.

Q. Perfect.

And then using that same picture, can you recall where you were?

A. You know, I'm saying roughly here. I was to the -- so I know I was to the left. So if it happened over here, that wouldn't surprise me.

Q. Okay.

A. But I was roughly to the left of something that happened down here. But I don't really recall.

Q. Okay. And when you were coming down the hill, did you see the rocks that Mr. Meyer hit?

MR. MCINTOSH: Objection, assumes facts not in evidence. Counsel's testifying.

MS. WALAS: You can go ahead and answer.

1 MR. MCINTOSH: You can answer.

2 THE WITNESS: I don't know. So I mean I know  
3 that I saw -- I know that I saw the ungroomed area  
4 that he crashed in that had early season stuff in  
5 it, trees and bushes and rocks and whatnot. But  
6 the rocks that he hit, I don't know. I don't know  
7 that I -- it registered on my consciousness. I  
8 mean I know that I was looking at it when I went  
9 down the slope and stopped.

10 BY MS. WALAS:

11 Q. And do you recall giving statements to  
12 Big Sky?

13 A. Yes, I do.

14 Q. Okay. And do you recall in that  
15 statement what you told them?

16 A. I do not specifically, no.

17 Q. Would it be helpful to see these?

18 A. Yeah, that would be super. Yeah. I  
19 mean they asked questions not -- so dissimilar to  
20 what you all are asking right now, mainly what  
21 happened.

22 MS. WALAS: I apologize, I did not bring  
23 copies. This will be 66. Go ahead and mark this  
24 as Exhibit 66.

25 ///

(Whereupon, Deposition  
Exhibit Number 66 was  
marked for identification.)

MS. WALAS: We can go off the record real quick.

VIDEO TECHNICIAN: We're now off the record.  
The time is 1:55.

(Whereupon, an off-the-record-discussion then took place.)

VIDEO TECHNICIAN: We're back on the record.  
The time is 1:56.

BY MS. WALAS:

Q. So I've given you what is Exhibit 66 and  
is that your witness statement?

A. Yes.

Q. Now is there anything in this witness statement that you would change or add to?

A. So let's read it aloud because I'm not sure I can read it. "Tom was standing" -- what's the next word there?

Q. I believe it's "below."

A. "Below the patient to his right.  
Patient came down from" -- so that first sentence,  
"Tom was standing below the patient to his right."

1 So directions are a funny thing. So I was on the  
2 cat. So first of all, "his" -- it's unclear  
3 whether "his" refers to patient or me. But I'll  
4 tell you what I know, which is that I was standing  
5 on the cat track and I was -- I was stopped, my  
6 skis were together, I was facing more toward the  
7 south than to the right of the cat track. I was  
8 facing that direction. And my head was turned  
9 uphill to my right and the skier came down the  
10 slope to my right. I'm not sure if that first  
11 sentence says that or not, but that's what  
12 happened.

13 So the second sentence says "Patient  
14 came down from highway." So I don't know what  
15 highway refers to. Is that the cat track? Because  
16 he came down from the slope above the cat track and  
17 hit rocks as he was about to jump off of Morning  
18 Star Road, Loop Road. "Both skis ejected and he  
19 rotated head first and landed on a log with the  
20 back of his head and neck. He was unconscious the  
21 entire time but was breathing. He did not move,  
22 eyes did not open. Breathing through nose only."  
23 Does that sound like what it says?

24 Q. I mean I think you've read it back  
25 accurately.

1                   Is there anything in there that you  
2 disagree with?

3                   MR. McINTOSH: Objection, vague.

4                   MS. WALAS: I'll restate it.

5 BY MS. WALAS:

6                   Q. Do you recall this being an accurate  
7 representation of what you told the Big Sky ski  
8 patrol that day?

9                   A. Yes.

10                  Q. And do you recall calling Big Sky back a  
11 couple days later to give a follow-up statement?

12                  A. Yes. Did I? I don't recall that, no.

13                  Q. Okay.

14                  A. No, I called back later and asked if the  
15 patient was okay.

16                  Q. Okay.

17                  A. Because it flipped me out. I thought  
18 the guy was dead. I really did. Because they  
19 choppered him off to Billings and a couple -- and I  
20 didn't see anything in the newspaper. And so a  
21 couple days later I called back and I said, "What  
22 happened to that guy?"

23                  (Whereupon, Deposition  
24                      Exhibit Number 67 was  
25                      marked for identification.)

1 BY MS. WALAS:

2 Q. Okay. I have what I've marked as  
3 Exhibit 67. Do you recall who you spoke to when  
4 you called back at Big Sky?

5 A. No.

6 Q. Okay. Do you recall if it was male or  
7 female?

8 A. I don't recall.

9 Q. Okay. I'll go ahead and give you  
10 Exhibit 67 and let you take a look at that and I'll  
11 ask you some questions on that.

12 A. Yes.

13 Q. Now do you recall telling this person at  
14 Big Sky that Mr. Meyer hits rocks after the cat  
15 track?

16 A. Yes.

17 Q. Okay. So this is an accurate  
18 representation of the statement that you made to  
19 Big Sky?

20 A. Correct.

21 Q. Okay. Now these rocks or log or this  
22 area where Mr. Meyer wrecked, was it marked in any  
23 way?

24 A. So let's --

25 MR. MCINTOSH: Objection, vague.

1           THE WITNESS: So let's be clear. So he's  
2 coming down the ski slope, he hits the track, the  
3 snow is rough. On the downside of that lip, my  
4 recollection is there was exposed gravel on the  
5 downside of the lip. He flipped and he landed on a  
6 tree. So you're using -- you're saying where he  
7 crashed. So there are two different elements of  
8 the crash, where the crash was initiated and where  
9 it ended.

10          MS. WALAS: Okay.

11          THE WITNESS: So there wasn't a log on the  
12 road. But my recollection is that on this track,  
13 on the downhill side there was a lip of icy  
14 granular snow and then it was bare on the downhill  
15 side there. There was gravel.

16 BY MS. WALAS:

17          Q. Okay. And in looking --

18          A. Early season conditions.

19          Q. And in looking at these pictures, can  
20 you see the gravel that you're speaking of --

21          A. No.

22          Q. -- in either Exhibit 25 or 24 from  
23 above?

24          A. No.

25          Q. Okay. And is the gravel that you're

1 talking about now, are those the rocks that you're  
2 referring to in this statement?

3 A. Correct.

4 Q. Okay. And so at that gravel were there  
5 any warning signs --

6 A. No.

7 Q. -- posted?

8 And were there any -- were there any  
9 signs in the area at all identifying the cat track  
10 or the road?

11 A. I don't recall. Lots of signs saying  
12 early season conditions.

13 Q. Okay.

14 A. But I don't recall whether there was a  
15 specific sign on the cat track. I just don't  
16 recall anything. My recollection is that there  
17 wasn't, but I don't recall.

18 Q. And do you recall if there was a  
19 chairlift in the area?

20 A. So that's a good question. I don't -- I  
21 don't ski this very much and so I don't -- I don't  
22 have a good memory of that.

23 Q. Okay.

24 A. It seemed like there was a chairlift up  
25 here to the right but that's the vaguest of

1 possible memories.

2 Q. Okay. So you're unclear if there was a  
3 chairlift or not?

4 A. Yeah, I am unclear.

5 Q. And what do you consider early ski  
6 conditions? You've been throwing that term around  
7 and I just want to make sure that we're on the same  
8 page when you're talking about early ski  
9 conditions.

10 A. So patchy snow with obstacles. So thin  
11 cover bleeding through to tree stumps and rocks  
12 that you have to ski around or they'll trip you up.

13 Q. Okay. And you said something earlier in  
14 your testimony that you -- you stopped on the cat  
15 track or road. I know everybody that skis refers  
16 to them as different things. So when I say cat  
17 track and road I mean the same thing.

18 Now you had planned to stop there,  
19 correct?

20 A. Yes.

21 Q. And with that knowledge, had you slowed  
22 down prior to getting there?

23 A. Yeah.

24 Q. Okay. And when you normally ski, if  
25 you're not going to stop -- be stopping to wait for

1 people on the cat track, do you just keep at your  
2 speed and just keep going down?

3 MR. MCINTOSH: Objection, vague.

4 THE WITNESS: I think sometimes, yes, and  
5 sometimes, no. That's the fun of skiing, right?

6 MS. WALAS: Okay.

7 THE WITNESS: But I might have skied down and  
8 just -- so you couldn't go straight on, right?

9 That's not an option. It was not -- that was not  
10 open. But I could have -- and it's downhill so the  
11 option is to take the cat track over left a little  
12 left and then ski down over to this broader area.  
13 And so I could imagine being by myself or with my  
14 son and just skiing onto that cat track and sliding  
15 parallel on the cat track and moving forward  
16 because it's flat and you might want to keep your  
17 speed going. But I can imagine stopping too and  
18 it's in the moment.

19 BY MS. WALAS:

20 Q. Okay. And on December 11th you don't  
21 know what Mr. Meyer's intentions were as he was  
22 going down the hill?

23 A. No. No way I could know.

24 Q. And so when you testified that he was  
25 getting ready to jump, that's just your guessing as

1 to what he was doing?

2 A. Yeah. It's just conjecture based on the  
3 fact that it was -- he hadn't slowed down. He  
4 wasn't turning. He was going straight down the  
5 hill at a high rate of speed.

6 Q. Okay. And do you know Mr. Meyer's  
7 skiing ability?

8 A. I have no idea.

9 Q. And --

10 A. He's a pretty good skier. I guess I do  
11 know a little bit, right? I saw him for five  
12 seconds ski down a difficult run at a high rate of  
13 speed and he was -- he knows what he's doing. He's  
14 got strong legs and he was hitting those moguls  
15 hard.

16 Q. Now besides the call back and the ski  
17 patroller that day at Big Sky, have you spoken to  
18 anyone else from Big Sky?

19 A. Like I said, I had this recollection of  
20 calling and asking if he was okay.

21 Q. The day of the wreck, did you talk to  
22 any of the ski patrollers around?

23 A. So when they -- there were quite a  
24 number of ski patrollers that came on the scene. I  
25 might have said a few words like "Can I help?" I

1 think I took his skis. Like his skis had been  
2 ejected and I was like, "Can I take them over to  
3 the toboggan?" And they said that would be  
4 helpful. I was trying to be helpful. And then  
5 they asked me to -- so they put him in the toboggan  
6 and took him over on this broad slope and went  
7 down. And they asked me to ski behind them and  
8 meet them at the ski patrol hut where I then made a  
9 statement. So yes, I guess I do.

10 Q. And you said there were a lot of ski  
11 patrollers around. Do you recall any of the ski  
12 patrollers saying anything about the area that you  
13 were standing in, like make any comments that just  
14 stuck out in your mind?

15 A. No. They seemed very focused on the  
16 quality of care. And there was clearly a senior  
17 person, whether it was a doctor or, I don't know, a  
18 senior medical person that -- my recollection is  
19 that they felt lucky that that person was there and  
20 available and on the scene and he seemed like he  
21 was giving the orders. And they were just like  
22 focused on getting this guy immobilized on the  
23 toboggan down the hill as quickly as possible.

24 Q. And have you spoken to Big Sky's counsel  
25 about this case?

1 A. Yes.

2 Q. Okay. How many times have you spoken  
3 with him?

4 MR. MCINTOSH: Objection, relevance.

5 THE WITNESS: Less than seven and more than  
6 two. I mean, so I think you spoke to me on the  
7 phone, you had me do an affidavit, we -- the  
8 plaintiff scheduled the deposition, the deposition  
9 didn't happen, the deposition got rescheduled.  
10 There was -- we've had some contact but really one  
11 substantive time, is my recollection about what  
12 happened.

13 MS. WALAS: Okay.

14 THE WITNESS: Yeah. The rest seemed like  
15 scheduling and the kind of comedy of errors around  
16 scheduling and representation.

17 BY MS. WALAS:

18 Q. Okay. And when you say "substantive"  
19 conversation, is that in relation to the affidavit  
20 you prepared?

21 A. Correct.

22 Q. And the facts that you put in that  
23 affidavit, that was -- those were your facts,  
24 correct?

25 A. Yes.

1           Q. Okay. And nothing that your discussions  
2 with counsel that have -- have they influenced your  
3 testimony?

4           A. No.

5           Q. Okay. And this is more of just a  
6 practical question. We're videotaping your  
7 deposition today I'm presuming because of the trial  
8 will be in Great Falls. Would it be a hardship for  
9 you to get to Great Falls in July to testify live?

10          A. Define hardship.

11          Q. That's up to the court to define  
12 hardship, but.

13          A. I can get to Great Falls.

14          Q. You can?

15          A. It's not convenient --

16          Q. Okay.

17          A. -- right? It's a day of my life.

18          MS. WALAS: If we can go off the record real  
19 quick, I might be all done.

20          VIDEO TECHNICIAN: We're now off the record.

21          The time is 2:10.

22                 (Whereupon, a brief  
23                    recess was taken.)

24          VIDEO TECHNICIAN: We're back on the record.  
25          The time is 2:10.

1 MS. WALAS: I don't have any further  
2 questions at this time. Thank you.

3 THE WITNESS: Thank you.

4 RE-EXAMINATION

5 BY MR. MCINTOSH:

6 Q. Mr. McMakin, just a few follow-up  
7 questions.

8 First of all, you said you recalled on  
9 December 11, 2015 when you skied in Big Sky, you  
10 said you saw lots of signs that said early season  
11 conditions. Do you remember saying that?

12 A. I do remember saying that, yes.

13 Q. Do you also recall seeing -- I'm going  
14 to show you what's been previously marked as  
15 Exhibit 19, and do you see the sign shown in  
16 Exhibit 19?

17 A. I see the sign in this picture, yes.

18 Q. And can you read that that sign states  
19 "Caution, Unmarked Hazards"?

20 A. Yes.

21 Q. And do you recall seeing signs that said  
22 "Caution, Unmarked Hazards" on December 11, 2015?

23 A. I do, but I couldn't locate where this  
24 sign is.

25 Q. You were asked by counsel a number of

1 questions about the rocks below the cat track, do  
2 you recall those questions?

3 A. I do recall.

4 MR. MCINTOSH: And we're on number 68; is  
5 that correct?

6 MS. WALAS: Yes.

7 (Whereupon, Deposition  
8 Exhibit Numbers 68 & 69  
9 were marked for identification.)

10 BY MR. MCINTOSH:

11 Q. Mr. McMakin, I'm going to hand you two  
12 photographs that I've marked as Exhibits 68 and 69.  
13 Please take a minute to review those.

14 A. (Witness complies.)

15 MS. WALAS: The one with the person is 68.

16 THE WITNESS: Okay.

17 BY MR. MCINTOSH:

18 Q. And do you recognize what is shown in  
19 Exhibits 68 and 69?

20 A. So I'm going to ask you some questions.  
21 So this is the cat track; is that correct?

22 Q. Correct.

23 A. And is this -- this is not the cat  
24 track, this is below it. The cat track is up here  
25 where the packed snow is?

1 Q. And you're referring now to Exhibit 69?

2 A. Correct.

3 Q. Yes.

4 A. And you're looking over the edge of it,  
5 yes. So what was your question?

6 Q. My question was, do you recognize what's  
7 shown in Exhibits 68 and 69?

8 A. I have located them in my brain. These  
9 were not -- so the left, 69, might have been my  
10 perspective. But 68 was not my perspective. My  
11 perspective was more of the person that's pictured  
12 standing on the cat track.

13 Q. Okay. In picture 68?

14 A. Correct.

15 Q. Okay. So would you agree with me that  
16 Exhibit 68 is a sideways view of the rocks below  
17 the cat track?

18 A. Correct, looking uphill.

19 Q. And Exhibit 69 is a photograph looking  
20 downhill at the rocks, correct?

21 A. Correct, sort of more eastward.

22 Q. And in both photographs 68 and 69 you  
23 can clearly see the rocks, correct?

24 A. Correct.

25 Q. And are these -- the rocks shown in

1 Exhibits 68 and 69, are those the rocks that you  
2 believe Mr. Meyer hit as you thought he was trying  
3 to jump off the cat track?

4 A. Yes.

5 Q. And earlier you were asked a question  
6 about what was going through Mr. Meyer's mind when  
7 he came down and went by you. And, of course, you  
8 don't know what was going through his mind, do you?

9 A. Right. No, I do not.

10 Q. But from what you observed, did it look  
11 to you like he was trying to jump off the downhill  
12 edge of the cat track?

13 A. Yes, that's what I said earlier. I  
14 believe that he was going straight down the hill at  
15 a high rate and he saw the cat track and he was  
16 going to jump off that lip.

17 Q. Thank you, Mr. McMakin. That's all the  
18 follow-up questions I have.

19 A. Okay.

20 MS. WALAS: I just have one, maybe two.

21 RE-EXAMINATION

22 BY MS. WALAS:

23 Q. You were asked about Exhibit 19 about  
24 that sign?

25 A. Yes.

1 Q. Do you see that sign in any of the  
2 pictures that you have been testifying about?

3 A. I do not.

4 Q. That's it. That's all I have. Thank  
5 you.

6 A. Cool. Thank you both.

7 Q. Thank you.

8 A. Onward and upward.

9 VIDEO TECHNICIAN: This now ends the  
10 deposition. The time is 2:15.

11

12 (Whereupon, the taking  
13 of this videotaped deposition  
14 was concluded at 2:15 p.m.)

15

16

17 SIGNATURE RESERVED

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1 DEPONENT'S CERTIFICATE  
2 PAGE LINE CORRECTION  
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14 I, TOM McMAKIN, the deponent in the  
15 foregoing deposition, DO HEREBY CERTIFY, that I  
16 have read the foregoing -40- pages of typewritten  
17 material and that the same is, with any corrections  
18 thereon made in ink on the correction sheet and  
19 signed by me, a full, true and correct transcript  
20 of my oral deposition given at the time and place  
21 hereinbefore mentioned.

22 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2020.  
23  
24

25 \_\_\_\_\_  
TOM McMAKIN

# C E R T I F I C A T E

STATE OF MONTANA )

) ss.

COUNTY OF GALLATIN )

I, Marla Jeske, Court Reporter - Notary Public, CSR, in and for the County of Gallatin, State of Montana, do hereby certify:

That the witness in the foregoing deposition was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the foregoing cause; that the deposition was then taken before me at the time and place herein named; that the deposition was reported by me in shorthand and later transcribed into typewriting under my direction, and the foregoing pages contain a true record of the testimony of the witness, all done to the best of my skill and ability.

IN WITNESS WHEREOF, I have hereunto set  
my hand and affixed my notarial seal this \_\_\_\_ day  
of \_\_\_\_\_, 2020.

## Notary Public for the State of Montana

residing at: Bozeman

My commission expires: February 04, 2023

TOM McMAKIN

Page 40

DEPONENT'S CERTIFICATE

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PAGE

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CORRECTION

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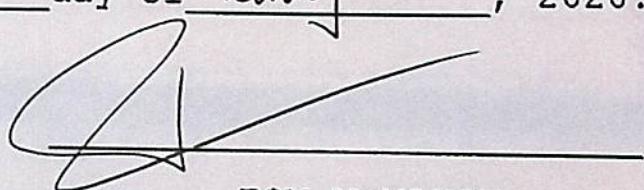
14 I, TOM McMAKIN, the deponent in the  
15 foregoing deposition, DO HEREBY CERTIFY, that I  
16 have read the foregoing -40- pages of typewritten  
17 material and that the same is, with any corrections  
18 thereon made in ink on the correction sheet and  
19 signed by me, a full, true and correct transcript  
20 of my oral deposition given at the time and place  
21 hereinbefore mentioned.

22 DATED this 5<sup>th</sup> day of February, 2020.

23

24

25



TOM McMAKIN

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